Lee Ming Chong Sdn Bhd v Prudential Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–1569 OF 2001
LEE SWEE SENG JC
12 DECEMBER 2011

Contract — Breach — Agreement — Sale and purchase of property — Defendant's consent not obtained within requisite period — Sub-purchaser terminated SPA — Whether plaintiff deprived of right to dispose property — Claim for loss of profit — Whether loss suffered was difference between current purchase price in sub sale and original purchase price — Factors considered in assessing appropriate amount

Contract — Sale and purchase of property — Breach — Sub sale transaction Strata title not issued — Plaintiff desirous of disposing his property — Sub-purchaser paid deposit — Deed of assignment to be endorsed by defendant/developer — Sub-purchaser terminate SPA as defendant's consent not obtained within requisite period — Whether defendant breached principal SPA — Whether defendant had right to impose condition before consenting to sub-sale — Whether defendant unreasonably withheld consent to sub sale

The plaintiff had, vide a sale and purchase agreement ('principal SPA') dated 17 October 1992, purchased from the defendant, the developer, an office lot ('the property') in Imbi Plaza, in 1992 and the full purchase, a sum of RM434,720, had been paid to the defendant. In February 2001, the plaintiff had entered into a sale and purchase agreement ('SPA') to sell the office lot to one Abdul Haiyum ('sub-purchaser') for RM700,000 and a deposit of RM70,000 had been paid to the plaintiff. As the strata title had not been issued, the plaintiff had sought the defendant's consent to the sub sale of the property. The plaintiff contended that the defendant had imposed seven conditions on the plaintiff in the sub sale instead of the three conditions stipulated in section 4.09 of the principal SPA. The defendant however, had imposed other conditions before consenting to the sub sale by the plaintiff/purchaser and this includes, inter alia, paying the arrears of service charge. As the defendant's/developer's consent was not obtained within the requisite period in the SPA, the said sub-purchaser had, in June 2001, terminated the SPA between him and the plaintiff. The plaintiff took the view that the defendant in breach of the principal SPA had unreasonably withheld its consent to the sub sale and had caused the sub sale to be terminated. The plaintiff claimed for its loss of profit of RM265,280 which is the difference between the original purchase price and the sub sale price. Further, the plaintiff prayed for a declaration that the defendant had unreasonably withheld its consent to the deed of assignment ('DOA') and that

the imposition of the conditions as conditions precedent to the granting of the consent to the DOA and the endorsement of the DOA was null and void and unenforceable. The issues for the determination of the court were as follows: (i) whether the defendant/developer has a right to impose the condition of the payment of arrears of service charge before consenting to the sub-sale by the plaintiff/purchaser; (ii) whether the imposition of condition (i) above was reasonable in the circumstances of the case; and (iii) whether the loss suffered was the difference between the current purchase price in the sub sale and the original purchase price.

Held, allowing the plaintiff's claim in part with costs:

(1) If the developer had wanted to impose the condition of having to settle all arrears of service charge before granting consent, it could easily have done so by spelling it out in section 4.09 of the principal SPA. Having not done that, any ambiguity must be resolved in favour of the weaker party not having the power to negotiate the terms of a standard form principal SPA often prepared by the developer's solicitors with terms favouring the developer. Indeed the principle of *contra proferentem* applies in that the ambiguity must be resolved against the developer that seeks to rely on it and in this case to rely on the ambiguity to withhold consent from the purchaser (see para 21).

(2) Had the developer applied for strata titles timeously to the whole Imbi Plaza, purchasers would not have this problem seeing that the principal SPA was signed as long ago as 17 October 1992. Even if there is room for the developer to reserve a residue of discretion to withhold consent, such a clause is totally inconsistent with the whole scheme and structure of the sale of the property where a strata title was to be issued seeing that the purchaser having paid the full purchase price to the developer, owes the developer no further obligation consistent with the purchaser's right as the absolute beneficial owner of the property with the developer being a bare trustee (see paras 22–23).

(3) Any imposition of any conditions should be viewed with much circumspection as the only reason for coming back to the developer was more for administrative expediency than having to fulfill any continuing obligations on the part of the purchaser. The developer will have the continuing obligation to ensure that the strata title once issued is duly registered in the name of the purchaser and for so long as the developer delays in applying for the strata title it will be saddled with this continuing obligation (see para 24).

(4) As Plaza Management Services Sdn Bhd ('PMS') was not duly licensed to collect service charges, and other rates and charges including arrears under the Act, the defendant cannot impose as a condition before it grants consent to the sub-sale that a sum of RM91,119.58 was to be paid

to PMS. To insist on that would be to act unreasonably in withholding consent to the sub sale (see para 35).

(5) There was also no justification in requiring the payment of RM3,511.20 being three months advance service charge from April to June 2001 to the defendant pending completion of transfer documents when the same was not due then (see para 40).

(6) It was crystal clear that what the purchaser had been deprived of wrongfully is the right to sell to anyone at any time that it should decide to sell consistent with his right of ownership of its property. For so long as the developer unreasonably refuses to grant consent, the purchaser would for that length of time be unreasonably deprived of his free enjoyment of its property which includes the right to sell at any time for a reasonable bargain and profit. Difficulty in assessing damages did not dispense with the need to award damages that this court would deem reasonable in the circumstances of the case (see paras 50–51).

[Bahasa Malaysia summary

Plaintif telah, melalui satu perjanjian jual beli ('PJB prinsipal') bertarikh 17 Oktober 1992, membeli daripada defendan, pemaju tersebut, suatu lot pejabat ('hartanah tersebut') di Imbi Plaza, dalam tahun 1992 dan harga penuh, sejumlah RM434,720 telah dibayar kepada defendan. Dalam bulan Februari 2001, plaintif memasuki perjanjian jual beli ('PJB') untuk menjual lot pejabat tersebut kepada Abdul Haiyum ('sub-pembeli') pada harga RM700,000 dan deposit sebanyak RM70,000 telah dibayar kepada plaintif. Oleh sebab hakmilik strata belum dikeluarkan, plaintif memohon persetujuan defendan untuk sub-jualan hartanah tersebut. Plaintif menyatakan bahawa defendan telah meletakkan tujuh syarat ke atas plaintif bagi sub-jualan di sebalik hanya tiga syarat yang dinyatakan dalam seksyen 4.09 SPA prinsipal. Defendan walau bagaimanapun, telah meletakkan syarat-syarat lain sebelum memberikan persetujuan untuk sub-jualan oleh plaintif/pembeli dan ini termasuk, antara lain, membayar tunggakan caj perkhidmatan. Oleh sebab persetujuan defendan/pemaju tidak diperoleh dalam tempoh yang diperlukan dalam PJB, sub-pembeli telah, dalam bulan Jun 2001, membatalkan PJB di antaranya dengan plaintif. Plaintif berpendapat bahawa defendan dalam kemungkiran PJB prinsipal telah secara tidak munasabah tidak memberikan persetujuan kepada sub-jualan dan telah menyebabkan sub-jualan tersebut terbatal. Plaintif menuntut bagi kerugian keuntungan sebanyak RM265,280 yang merupakan perbezaan di antara harga asal belian dan harga sub-jualan. Selanjutnya, plaintif memohon untuk deklarasi bahawa defendan telah secara tidak munasabah tidak memberikan persetujuan kepada surat ikatan penyerahakkan ('SIP') dan bahawa peletakkan syarat-syarat sebagai syarat-syarat duluan untuk pemberian persetujuan kepada SIP dan pengendorsan SIP adalah batal dan tidak sah dan tidak boleh dikuatkuasakan. Isu-isu untuk pertimbangan mahkamah ini adalah seperti berikut: (i) sama ada

defendan/pemaju mempunyai hak untuk meletakkan syarat untuk bayaran tunggakan caj perkhidmatan sebelum bersetuju kepada sub-jualan; (ii) sama ada peletakkan syarat-syarat (i) di atas munasabah dalam hal keadaan kes; dan (iii) sama ada kerugian yang dialami adalah perbezaan di antara harga belian semasa di dalam sub-jualan dan harga belian asal.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos:

(1) Jika pemaju ingin meletakkan syarat perlu menyelesaikan tunggakan caj perkhidmatan sebelum memberikan persetujuan, ia boleh dibuat secara mudah dengan menyatakannya di dalam seksyen 4.09 PJB prinsipal. Oleh sebab ia tidak dilakukan, apa-apa keraguan harus diputuskan memihak kepada pihak yang lebih lemah yang tidak mempunyai hak untuk menawar terma borang standard PJB prinsipal yang biasanya disediakan oleh peguamcara pemaju dengan terma memihak kepada pemaju. Sememangya prinsip *contra proferentum* beraplikasi di mana keraguan mesti diputuskan terhadap pemaju yang memohon untuk menyandar ke atasnya dan di dalam kes ini untuk menyandar atas keraguan untuk tidak memberikan persetujuan kepada pembeli (lihat perenggan 21).

(2) Jika pemaju telah memohon hak milik strata dalam tempoh yang sepatutnya kepada keseluruhan Imbi Plaza, pembeli-pembeli tidak akan mempunyai masalah ini melihatkan PJB prinsipal telah ditandatangani seawal 17 Oktober 1992. Walaupun ada ruang untuk pemaju mempunyai budi bicara untuk tidak memberikan persetujuannya, klausa sedemikian adalah secara keseluruhannya tidak konsisten dengan skim dan struktur tersebut untuk jualan hartanah di mana hak milik strata perlu diberikan melihatkan pembeli telah membayar kesemua harga belian kepada pemaju, tidak ada tanggungjawab lanjut kepada pemaju, konsisten dengan hak pembeli sebagai pemilik benefisial mutlak hartanah tersebut dengan pemaju sebagai pemegang amanah sahaja (lihat perenggan 22–23).

(3) Peletakkan apa-apa syarat harus dilihat dengan berwaspada kerana satu-satunya alasan untuk merujuk semula kepada pemaju adalah untuk mempercepatkan urusan pentadbiran daripada terpaksa memenuhi kewajipan berterusan pada pihak pembeli. Pemaju mempunyai kewajipan berterusan untuk memastikan bahawa hak milik strata sebaik sahaja diberikan, didaftar atas nama pembeli dan selagi pemaju melambatkan permohonan untuk hak milik strata ia akan dibebani dengan kewajipan berterusan tersebut (lihat perenggan 24).

(4) Oleh sebab Plaza Management Services Sdn Bhd ('PMS') tidak diberikan lessen untuk mengutip caj perkhidmatan, dan lain-lain kadar dan caj termasuk tunggakan di bawah Akta, defendan tidak boleh meletakkan syarat sebelum ia memberikan persetujuannya untuk sub-jualan bahawa

sejumlah RM91,119.58 perlu dibayar kepada PMS. Untuk mendesaknya adalah bermaksud bertindak secara tidak munasabah dalam tidak memberikan persetujuan untuk sub-jualan (lihat perenggan 35).

(5) Juga tidak ada justifikasi dalam meminta bayaran sebanyak RM3,511.20 sebagai bayaran muka tiga bulan caj perkhidmatan dari bulan April hingga Jun 2001 kepada defendan sementara menunggu penyelesaian dokumen-dokumen pindah milik apabila ia belum menjadi tertunggak pada masa itu (lihat perenggan 40).

(6) Adalah amat jelas bahawa apa yang pembeli telah dilucutkan secara salah haknya untuk menjual kepada sesiapa sahaja pada bila-bila masa ia memutuskan untuk menjual konsisten dengan hak pemilikan hartanahnya. Selagi pemahu enggan memberikan persetujuan secara tidak munasabah, pembeli akan, selama itu dilucutkan secara tidak munasabah untuk bebas menikmati hartanahnya yang termasuk hak untuk menjual pada bila-bila masa pada tawaran dan keuntungan yang munasabah. Kerumitan dalam menilai ganti rugi tidak menghalang keperluan untuk mengawardkan ganti rugi yang mahkamah berpandangan sebagai munasabah dalam keadaan kes (lihat perenggan 50–51).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

For cases on breach, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5858–5867.

Cases referred to

Alice Wee v Yeo Gek Lang [1978] 1 MLJ 196 (refd)

Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174 (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 3 MLJ 349; [2005] 2 CLJ 914, CA (refd)

Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, HL (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007

Contract Acts 1950 s 74(1)

Housing Development (Control and Licensing) Act 1966 ss 22D(1), (2), (3), (4)

Housing Development (Control and Licensing) Act 2007 ss 22D(4), 22D(6)

Rules of the High Court 1980

Strata Titles Act 1985

Valuers, Appraisers and Estate Agents Act 1981 ss 21(1)(aa), (2), 23(1)

Valuers, Appraisers and Estate Agents Rules 1986 rr 25B(1), 25B(3), 25B(3) A

Benedict KF Chan (Chan Benedict & Partners) for the plaintiff.
Wiston PC Ng (Winston Ng & Teoh) for the defendant.

Lee Swee Seng JC:

B

PROLOGUE

[1] Parliament had intervened in the unhappy state of affairs of developers imposing all kinds of fees and conditions on purchasers and subpurchasers when they want to sell their properties to which strata titles have not been issued. Housing Development (Control and Licensing) Act 1966 ('HDA') was amended to allow only the imposition of RM50 (s 22D(4)) for the fee that a developer may charge to verify and confirm the beneficial interest of the purchaser and to take away the need for concurrence of the developer to a subsale (s 22D(1)) and only requires the developer to be given a copy of the deed of assignment ('DOA') and other documents (s 22D(2)) presumably for the purpose of updating their record so that the strata title when issued is transferred to the right ultimate purchaser and beneficial owner (s 22D(3)). C D

[2] However the luxury of such a protection applies to only housing developments under the HDA which cover residential development, shop houses and recently even service apartments. It still leaves purchasers of office lots and industrial lots very much at the mercy of the developer when it comes to obtaining consent for subsale with purchasers having to pay as much as 1% of the subsequent subsale purchase price not to mention other terms that might be unilaterally imposed. The simmering complaints of purchasers become more strident when it is often the delay caused by the developer that had caused the delay in the issuance of the strata titles. Why should a purchaser who had already paid the full purchase price to a developer be in subservient homage to the developer having to silently stomach all kinds of conditions imposed on the sub sale. Some purchasers protested softly but the purchaser in this case decided to sue the developer for its losses suffered as a result and to seek the court's pronouncement on the limits of the law where the rights of a purchaser is concerned vis-a-via a developer in a sub sale transaction where the strata title has not been issued yet. E F G H

[3] The present dispute between the plaintiff as a purchaser and the defendant as a developer highlights the tussle and trouble that some purchasers have to battle before they could dispose of their properties when strata titles have not been issued. I

PARTIES

[4] The plaintiff had entered into a sale and purchase agreement ('principal

SPA') dated 17 October 1992 with the defendant to purchase an office lot ('the property') in Imbi Plaza, Jalan Imbi, Kuala Lumpur for RM434,720. Full purchase price had been paid to the defendant as a developer. There was a point in 1996 when the defendant's then solicitors wrote to the plaintiff to inform the plaintiff that it must pay the service charges to Imbi Plaza Management Services Sdn Bhd ('IPMS').

[5] On 8 January 1997 the defendant by a deed of assignment with IPMS, assigned all its rights to collect service charges, and other rates and charges including arrears and rights to demand performance, to sue and enforce to IPMS.

[6] On 7 June 2000, the defendant by a management agreement appointed GCB Properties Management Sdn Bhd ('GCB') to manage, maintain and upkeep Imbi Plaza WEF February 2000 until determination and, inter alia, to collect all maintenance charges, administrative fees, outgoings and other incidentals from purchasers of Imbi Plaza and to carry out repairs and maintenance.

[7] The plaintiff was desirous of disposing of the property and so on 15 February 2001 the plaintiff entered into a sale and purchase agreement (SPA) to sell the office lot to one Abdul Haiyum bin Abdul Hamid (sub-purchaser) for RM700,000. Abdul Haiyum paid a deposit of RM70,000 to the plaintiff.

PROBLEM

[8] As the strata title has not been issued, any sub sale would be by way of a deed of assignment between the plaintiff and its sub-purchaser duly endorsed by the defendant developer as hitherto has been the practice. The plaintiff's solicitors vide their letter of 20 February 2001 to the defendant sought the defendant's consent to the subsale of the property. In response, on 27 February 2001 vide the defendant's letter to Chan Roszimah & Co, the plaintiff's solicitors (exh P5 at pp 29–30 of common bundle of document bundle B), the defendant agreed to endorse its consent on deed of assignment (DOA) between the plaintiff and the sub-purchaser provided:

(a) RM91,119.58 is paid to IPMS; RM66,712.80 (service charges) and RM24,406.78 (interest) within 14 days from the date of defendant's letter;

(b) RM11,692.64 is paid to GCB; RM11,266.72 (service charges) and RM425.95 (interest) within 14 days from date of the defendant's letter;

(c) RM500 is paid to the defendant (administrative fee) for the transfer of the property;

(d) RM3,511.20 is paid to the defendant (three months' advance service charges) for 04 to 06/2001 pending completion of transfer documents;

(e) sub-purchaser executes a letter of undertaking to pay service charges and all other charge WEF 1 April 2001 in the event the transfer documents are not completed;

(f) sub-purchaser executes a letter of undertaking not to do lodge any private caveat on the master title to the property prior to the issuance of the strata title; and

(g) the deed of assignment is in form and manner acceptable to the defendant.

[9] The plaintiff contended that the defendant had imposed seven conditions on the plaintiff in the subsale instead of the three conditions stipulated in section 4.09 of the principal SPA. Section 4.09 of the principal SPA (page exh P1 at p 7 of bundle B) provides as follows:

> From the date of this Agreement and until issues of a subsidiary title to the said Premises and a transfer thereof to the Purchase, the *Purchaser shall not re-sell transfer or assign* the right duties and obligations under this Agreement *without the written consent of the Company first had and obtained such consent not to be unreasonably withheld* PROVIDED ALWAYS that — *(i)* such *transfer or assignment shall be in such form and substance acceptable* to the Company and that *(ii)* any *transfer fee* imposed (which shall be Malaysian Ringgit One Thousand (M$1,000.00) or one per centum (1%) of the total consideration whichever is the higher) by the Company and *(iii)* the legal costs and expenses of such transfer or assignment (including the Company's solicitors' costs) shall be borne absolutely by the Purchaser. (Emphasis added.)

[10] A dispute arose as to who the plaintiff should pay the service charge to and what is the amount and further whether the defendant can refuse to consent to the subsale and the DOA merely because the service charges have not been paid. There was no issue with the plaintiff complying with the three conditions set out in section 4.09 of the principal SPA and it was only primarily the impediment of the imposition of the payment of the arrears of service charges that had come in the way of the plaintiff disposing of his property to Abdul Haiyum as the sub-purchaser.

[11] The said sub-purchaser decided to terminate the SPA between him and the plaintiff by letter dated 29 June 2001 for the defendant's/developer's consent was not obtained within the requisite period in the SPA. The deposit paid was duly refunded to him by the plaintiff (exh P19 at p 76 of bundle C).

PRAYER

[12] The plaintiff took the view that the defendant in breach of the principal

SPA had unreasonably withheld its consent to the subsale and the DOA and that had caused the subsale to be terminated. The plaintiff claimed for its loss of profit of RM265,280 which is the difference between the original purchase price of RM437,720 and the subsale price of RM700,000 together with interest and costs.

[13] The plaintiff also prayed for a declaration that the defendant had unreasonably withheld its consent to the DOA by imposing the following conditions on the plaintiff and that the imposition of these conditions as conditions precedent to the granting of the consent to the DOA and the endorsement of the DOA is null and void and unenforceable:

(a) RM91,119.58 be *paid to IPMS*; RM66.712.80 (service charges) and RM24,406.78 (interest) within 14 days from the date of defendant's letter of 27 February 2001;

(b) RM11,692.64 be *paid to GCB*; RM11,266.72 (service charges) and RM425.95 (interest) within 14 days from date of the said defendant's letter; and

(c) RM3,511.20 be paid to the defendant (three months' advance service charges) for 04 to 06/2001 pending completion of transfer documents.

PRINCIPLES

Whether the defendant/developer has a right to impose the condition of the payment of arrears of service charge before consenting to the subsale by the plaintiff/purchaser

[14] Section 4.09 of the principal SPA only requires three conditions to be fulfilled before consent may be granted to the subsale. The three conditions are that: '(i) the transfer and assigment shall be in such form and substance acceptable to the Defendant and (ii) any transfer fee imposed (which shall be Malaysian Ringgit One Thousand (M$1,000.00) or one per centum (1%) of the total consideration whichever is the higher) by the Defendant and (iii) the legal costs and expenses of such transfer or assignment (including the Defendant's solicitors' costs) shall be borne absolutely by the Purchaser'.

[15] Learned counsel for the defendant, Mr Winston Ng, contended that even if the purchaser has complied with all the three conditions the developer can still withhold consent since the operative words in section 4.09 are '… the Purchaser shall not re-sell transfer or assign the right duties and obligations under this Agreement without the written consent of the Company first had and obtained *such consent not to be unreasonably withheld PROVIDED ALWAYS that*: (i)....(ii) and (iii)'. (Emphasis added.) His argument is that the purchaser may have fulfilled all the three conditions imposed but the developer still has a

right to withhold consent provided always that the withholding of the consent is reasonable. One may ask how then would one especially a purchaser who has little or no negotiating power ascertain whether the developer might withhold consent on tenuous and flimsy grounds like for instance certain conditions not spelled out in the principal SPA being now imposed on the purchaser?

[16] Learned counsel's argument is that otherwise the word 'unreasonably' might as well not be there and the operative words should just be '… such consent not to be withheld PROVIDED ALWAYS that: …' It would then be a case where once the three conditions are met the consent cannot be withheld. Otherwise the three conditions could have been fulfilled but the developer could still impose other conditions and if parties cannot agree then a court of law would have to determine if the imposition of such other conditions are reasonable in the circumstances of the case to determine if the withholding of the consent was reasonable.

[17] Learned counsel for the developer referred to *Stroud's Judicial Dictionary of Words and Phrases*, Eleventh Cumulative Supplement to the (5th Ed), 1997 where at p 331 under the meaning of 'unreasonably' it was explained thus:

> 'Consent was unreasonably withheld' (Landlord and Tenant Act 1954 (c.56), s.53). In determining whether, for the purposes of this section, a landlord's consent to a change of land use was 'unreasonably refused' the court should first seek to ascertain the reason on which the landlord had acted, and then consider whether, objectively, refusal for that reason was reasonable (*Tollbench v Plymouth City Council* [1988] 23 EG 132).

[18] Further at p 332 it was held that:

> The reasonableness of a decision to withhold consent to an assignment must be judged, for the purposes of the Landlord Tenant Act 1988 (c.26), s.1(3)(a) by reference to circumstances existing and known to the landlord when he made the decision (*CIN Properties v. Gill* [1993] 38 EG 152).

[19] I have neither quarrel nor qualm with the above proposition but the question is this: After listing three conditions precedent to be fulfilled before granting consent, can the developer retain a residue of discretion to ask further conditions the non-fulfillment of which allows the developer to assert that it had not unreasonably withheld its consent? I do not think so. I would read the adverb 'unreasonably' in '… such consent shall not be *unreasonably* withheld PROVIDED ALAWAYS:' to mean that once the three conditions are fulfilled, it would mean that any withholding of consent shall be deemed to be unreasonble.

[20] Learned counsel for the plaintiff, Mr Benedict Chan, referred to the

House of Lords case of *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 where Lord Pearson expressed with much perspicuity at pp 267–268 as follows:

> Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the court does not make the contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interprete and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of the contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves …

[21] If the developer had wanted to impose this condition of having to settle all arrears of service charge before granting consent, it could easily have done so by spelling it out in section 4.09 of the principal SPA. Having not done that, any ambiguity must be resolved in favour of the weaker party not having the power to negotiate the terms of a standard form principal SPA often prepared by the developer's solicitors with terms favouring the developer. Indeed the principle of contra proferentem applies in that the ambiguity must be resolved against the developer that seeks to rely on it and in this case to rely on the ambiguity to withhold consent from the purchaser. See the Court of Appeal case of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 3 MLJ 349; [2005] 2 CLJ 914 which decision was affirmed by the Federal Court.

[22] Had the developer applied for strata titles timeously to the whole Imbi Plaza, purchasers would not have this problem seeing that the principal SPA was signed as long ago as 17 October 1992. Why should a purchaser be subject to more conditions to fulfill when a similar purchaser of an office lot with a strata title issued would not ever need to seek the developer's consent for anything when the purchaser should want to dispose of his property?

[23] Even if there is room for the developer to reserve a residue of discretion to withhold consent, such a clause is totally inconsistent with the whole scheme and structure of the sale of the property where a strata title is to be issued seeing that the purchaser having paid the full purchase price to the developer owes the

developer no further obligation consistent with the purchaser's right as the absolute beneficial owner of the property with the developer being a bare trustee. A

[24] Judging the conduct of the giving or withholding consent to the assignment in the conveyancing context of a purchaser who had paid the full purchase price to the property, I would say any imposition of any conditions should be viewed with much circumspection as the only reason for coming back to the developer is more for administrative expediency than having to fulfill any continuing obligations on the part of the purchaser. The developer will have the continuing obligation to ensure that the strata title once issued is duly registered in the name of the purchaser and for so long as the developer delays in applying for the strata title it will be saddled with this continuing obligation. B C

[25] It was further argued for the developer that the purchaser has a continuing obligation to pay service charges quarterly in advance to the developer in as much as the developer has an obligation to maintain the common properties under section 4.01(b) of the principal SPA. Whilst that may be so, any dispute between the two must be sorted out in a court of law and any non-payment must be by way of the developer suing under a debt due to it. D E

[26] Even under the new scheme of the Building and Common Property (Maintenance and Management) Act 2007 which came into force on 12 April 2007, a joint management body ('JMB') comes into being pending the issuance of the strata titles where the JMB provides the service of maintaining the common properties and any non-payment is to be sorted out either by a quick system of attachment of the moveables in the property and by way of recovery as a civil debt. F G

[27] Likewise when strata titles are issued and the management corporation comes into being under the Strata Titles Act 1985 , it takes over the obligation to maintain the common properties and there is no provision where if a purchaser has service charges in arrears then he cannot dispose of his property now held under a strata title. H

[28] How a developer can arrogate to itself the power to hold a purchaser to ransom until it settles what in this case is disputed service charges before granting its consent to the property to be disposed of, smacks of high-handedness and not a little haughtiness. I

[29] Indeed under the latest amendment to the HDA introduced by the Housing Development (Control and Licensing) Act 2007, Parliament in its wisdom has seen it fit to criminalise under s 22D(6) any action of a developer

requiring consent to any absolute assignment in a subsale transaction or to impose any other fee other than the RM50 imposed under s 22D(4) and shall upon conviction be liable to a fine not less than RM50,000 and not exceeding RM150,000 or to imprisonment not exceeding three years or to both.

[30] Though this case does not come within the HDA, one can certainly take note of the change in public policy with this amendment to the HDA under the HDA (Amendment) Act 2007.

Whether the imposition by the developer/defendant of the condition of paving arrears of service charge by the purchaser/plaintiff before consenting to the subsale is reasonable in the circumstances of the case

[31] Assuming for a moment that the fulfiment of the three conditions precedent in section 4.09 of the principal SPA does not mean that the developer is obliged to give consent, would the imposition of this condition of payment of arrears of service charge before consenting to the subsale, be tantamount to unreasonably withholding consent by the developer? On 16 April 1996 the defendant's former solicitors, Lawrence & Co, refused to accept service charges paid by the plaintiff to the defendant and insisted that payment be made to IPMS and returned the payment to the plaintiff. See p 41 of bundle B.

[32] The plaintiff later learned that on 8 January 1997 the defendant had entered into a deed of assignment (the defendant's deed of assignment) (exh P7 at pp 24–26 bundle B) with IPMS assigning all (see recital 3 and cl 1) of the defendant's right to collect services charges and other rates and charges including arrears and right to demand performance, to sue and enforce. IPMS agreed to assume all (see cl 3) sundry obligations and liabilities in the management of Imbi Plaza and is entitled to all benefits, rights, title and interest vested in the defendant as fully and effectively as if IPMS has been the party to the principal sale agreement in place of the defendant.

[33] However there is a problem here. IPMS is not duly licensed under s 21(1)(aa) of the Valuers, Appraisers and Estate Agents Act 1981 to provide the services of or to act as a property manager for Imbi Plaza. The plaintiff called as a witness PW3 Puan Kathijah bt Abdullah from the Board of Valuers, Appraisers and Estate Agents Malaysia who confirmed the Board's letter dated 15 May 1996 (exh P9 at p 42 of bundle B) that IPMS cannot collect service charges without a license under r 49 of the Valuers, Appraisers and Estate Agents Rules 1986 read with r 25B(1) and (3). PW3 was a Board member from 1985 to 2007 and she was duly authorised by the Board to give evidence in court. There is an exception to s 21(1)(aa) and that is provided for under s 21(2) where the owner of any land, building and any interest therein who

manages such land, building and interest is exempted. PW3 also confirmed that a police report was lodged in 1999 against IPMS for providing the services of a property manager without being licensed or registered under the Act. She also testified that two warning letters were sent by the Board to IPMS. The plaintiff was thus left in a quandary as to the legitimacy of making payments to an unlicensed entity not authorised to provide such services.

[34] The Act is clear on who may provide the services of a property manager and collect fees and charges for the services rendered. Section 23(1) of the Act further states that:

> No registered valuer, appraiser or estate agent shall practise valuation, appraisal or estate agency or have the right to recover in any court any fee, charge or remuneration for any professional advice or services rendered by him pursuant to his practice unless he practises as a sole proprietor of a sole proprietorship, a partner of a partnership, a shareholder or director of a body corporate registered with the Board, or as an employee of such sole proprietorship, partnership or body corporate.

[35] As IPMS is not duly licensed to provide such a service under the Act, the defendant cannot impose as a condition before it grants consent to the subsale that a sum of RM91,119.58 is to be paid to IPMS. To insist on that would be to act unreasonably in withholding consent to the sub sale. There was a further development on 7 June 2000 when the defendant entered in a management agreement (management agreement) at pp 55–62 of bundle B with GGB Properties Management Sdn Bhd (GCB) to manage, maintain and upkeep Imbi Plaza wef February 2000 until determination and, inter alia, to collect all (see cl 4(a)) maintenance charges, administrative fees, outgoings, and other incidentals from purchasers of Imbi Plaza and to carry out, inter alia, repairs and maintenance. However the defendant through its solicitors' letter dated dated 18 July 2001 (exh P11 at p 38 of bundle B) admitted that the management agreement was invalid. There is merit in the plaintiff's contention that that being the case the plaintiff cannot be asked to pay RM11,692.64 to GCB and to impose that as a condition before granting consent to the subsale would be to withhold consent unreasonably.

[36] In an attempt to resolve the matter the plaintiff's solicitors once again wrote vide their letter of 2 April 2001 to the defendant (exh P6 at pp 31–32 of bundle B) stating that the plaintiff was ready and willing to pay the service charges to the defendant upon receipt of its confirmation that payment is to be made to the defendant. The defendant vide its letter of 9 April 2001 to the plaintiff (exh 13 at p 33 bundle B) agreed to accept service charges payable. The plaintiff wrote again by letter dated 14 May 2001 to the defendant (exh P 15 at pp 35–36 of bundle B) to enquire if the defendant's deed of assignment with IPMS and the management agreement had been revoked and the reply of the defendant's solicitors dated 18 July 2011 was '… the outstanding/future

maintenance charges is settled direct to IPSM'. See exh P11 at p 38 of bundle B. That coupled with the fact that the defendant had by para 10 of its defence taken the stand that the defendant's deed of assignment with IPMS is still valid has created some serious doubts as to who is legally entitled to payment of the service charge.

[37] Indeed there was another proceeding in Kuala Lumpur Sessions Court Summons No 6–52–363 of 1998 between IPMS and another purchaser Linsea Holdings Sdn Bhd and another where IPMS failed in the sessions court to claim for the arrears of service charges and on appeal to the High Court a consent judgment was entered into.

[38] All said the purchaser cannot be faulted for taking the stand that when there is so much uncertainty and legal impediments in paying the arrears of service charges to IPMS and GCB, such an imposition of payments to IPMS and GCB before consent is given to the subsale would be withholding the consent unreasonably in the circumstances of the case.

[39] Once wonders why the defendant has not commenced action in the courts to recover the arrears of service charges if it is sure of its position in law. The amounts being due in February 2001 when the conditional consent letter from the developer was issued, it appears that limitation might have set in. Is the developer taking the short cut be telling itself that instead of confronting the legal land mines as to who is entitled to payments of service charges, the developer or IPMS or GCB, perhaps it would have been easier for them to circumvent it by imposing arrears of service charges when the purchaser wants to sell and by then the purchaser might not have the luxury of time to bargain with the developer as the sub-purchaser might want to terminate the subsale agreement if the developer's consent is not forthcoming. Whilst others might prove to be an easy and soft target, the plaintiff here is both tough and bold and would not tolerate any bullying from the developer. To be candid it is a comedy of errors of its own creation that now confronts the developer? Circumventing it would not be easy for the rest might be emboldened by the plaintiff to mount a similar challenge.

[40] There was also no justification in requiring the payment of RM3,511.20 being three months advance service charge from April to June 2001 to the defendant pending completion of transfer documents when the same was not due then. It is part of the developer's *kiasu* attitude and to insist on that as a condition before consenting to the subsale would be to unreasonably withhold consent.

Whether the loss suffered is the difference between the current purchase price in the subsale and the original purchase price

[41] Having found that the imposition of the payments of arrears of service

charge to IPSM and GCB as a condition precedent for consenting to the sub sale would be tantamount to unreasonably withholding consent, is the purchaser/plaintiff entitled to the claim for RM265,280?

[42] Learned counsel for the plaintiff referred to *The Sale and Purchaser of Real Property in Malaysia* 1984 Butterworths at p 383 where the learned author who was also a former judge of the High Court, Visu Sinnadurai observed:

> … the Courts have accepted the subsequent resale by the vendor to another purchaser as an indication of the market value of the property. In such cases, they have deemed the price agreed to be paid by the subsequent purchaser for the same property to be the market price of the property:
>
> Because of the difficulties in forming an exact estimate of the market value of a piece of land, on which opinions may well differ, the price at which a plaintiff contracts to resell the property, though strictly irrelevant per se, has been taken as prima facie evidence of the market value (Gill J in *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174 at page 177) In cases where the purchaser, sues for damages, the Court have also accepted the price at which the purchaser had agreed to resell the property to a subsequent purchaser to be the market value. *In Khor Seng Lee v Sithu Ramasamy Chetty* (1927) 6 FMSLR 98) and *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174, the Court accepted the price at which the plaintiffs had agreed to resell the property as the market value of the said property. In both the cases the plaintiff-purchaser was held entitled to recover from the defendant-vendor the difference in the price at which the plaintiff agreed to buy the property from the defendant and that at which the plaintiff had subsequently agreed to resell to another party.

[43] Learned counsel for the plaintiff submitted that it is entitled to rely on s 74(1) of the Contracts Act to claim its loss from the defendant. Section 74(1) of the Contract Acts 1950 provides:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[44] Support for such a reliance can be found in the dicta of His Lordship Gill J (as he then was) in *Central Malaysia Development Co Ltd v Chin Pak Chin*'s case where at p 177 it was observed:

> It is to be observed that the s [74] is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property. In other words, the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities.

[45] There is however a fundamental flaw in the proposition of the plaintiff's solicitors for the simple reason that though there was a breach of contract of the part of the developer, what the plaintiff lost was the opportunity to make some gains if he had been able to effectively sell the property but for the unreasonable withholding of consent to the subsale by the developer. Be that as it may the purchaser still has the property. The purchaser could now sell it at probably a higher price than the price he could fetch in 2001 at RM700,000. This court can take judicial notice of the fact that prices of office space in Jalan Imbi and generally the Golden Triangle area have gone up through the years. At any rate none of the parties had led evidence to show to the contrary.

[46] Learned counsel for the plaintiff kept insisting that the price difference between the original price and the subsale price is the loss suffered by the plaintiff as borne by the authorities. However the cases referred to are not cases where after the breach by the defaulting party the party who suffered because of the breach is still left with the property because the sale did not go through. The case of *Central Malaysia Development Co Ltd's* referred to was a case where the party that suffers because of the breach by the seller is unable to deliver the property to its sub-purchaser with the result that it was deprived of the profit that it could have made had the deal gone through but for the default of its seller to transfer to him the property. The case of *Alice Wee v Yeo Gek Lang* [1978] 1 MLJ 196 was one where the purchaser refused to complete the sale and purchase agreement such that the seller had to sell eventually the property at a lesser price to another purchaser. As can be seen the cases referred to are pure missed opportunity cases where the party that suffers for the breach of the other suffers the loss in price difference as a result of the bargain and in the interchange the property is no longer with the party that suffers.

[47] Here the property is still with the purchaser. What if the purchaser had not given up upon getting from the developer a refusal to grant consent to the subsale and attempted to sell the same property in the year three times to three different sub-purchasers but unsuccessfully because the developer just refused to grant the consent to the subsales? Assuming the price to be the same as the present case, then does it mean that the plaintiff can claim three times RM265,280. The answer is a resolute and resounding 'NO'! There reason is not difficult to realise — the property is then still with the purchaser and he could still dispose of it anytime he wants.

[48] On the other hand the argument of the learned counsel for the defendant was that there is no evidence led that the plaintiff as purchaser has suffered any loss. The property is still under the beneficial ownership of the plaintiff. Unless the plaintiff can show a price difference when it could eventually sell the property the plaintiff would at best be entitled to nominal damages.

[49] I rejected both the arguments of the purchaser and the developer as the former borders on non sensical and the latter on naivety.

[50] It is crystal clear that what the purchaser had been deprived of wrongfully is the right to sell to anyone at any time that it should decide to sell consistent with his right of ownership of its property. For so long as the developer unreasonably refuses to grant consent, the purchaser would for that length of time be unreasonably deprived of his free enjoyment of its property which includes the right to sell at any time for a reasonable bargain and profit.

[51] However it is difficult to quantify how much is this impediment that the purchaser continues to suffer as its property could not be sold for so long as the developer unreasonably withholds consent to the subsale. Difficulty in assessing damages does not dispense with the need to award damages that this court would deem reasonable in the circumstances of the case. This court would have regard to the following in assessing damages for the purchaser/plaintiff against being deprived of its right to dispose of its property at any time it wanted:

(a) the purchase price of the sub sale of RM700,000 generating a gross profit of RM265,280 when compared to the original purchase price;

(b) the plaintiff still has enjoyment of the property to this day save for the liberty to sell at anytime to anyone;

(c) the fact that the developer/defendant had not relented inspite of two written reminders from the plaintiff's solicitors that if consent is not granted the sub-purchaser would terminate the subsale;

(d) the fact that generally the property would have appreciated in value since 2001 when the subsale was entered into; and that

(e) a public policy paradigm shilft is palpable as can be gauged from Parliament criminalising a developer's action in imposing the requirement of its consent to a subsale for residential apartments, shop houses and service apartments.

PRONOUNCEMENT

[52] Taking all the above circumstances into consideration, I had assessed and awarded damages of RM50,000 to the plaintiff together with interest at the rate of 4%pa from the date of writ, 4 September 2001 to date of realisation. I had also granted the declarations prayed for in para 20 of the statement of claim as set out above. I fixed costs at RM20,000 to be paid by the defendant

to the plaintiff. The plaintiff is to pay the requisite fees under the Rules of the High Court 1980 before extracting the allocatur.

Plaintiff's claim allowed in part with costs.

Reported by Ashgar Ali Ali Mohamed